Office-Supreme Court, U.S.
FILED
NOV 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-407

In the Supreme Court of the United States

OCTOBER TERM, 1984

DELBERT PAUL HOSKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Bruton v. *United States*, 391 U.S. 123 ..... 3, 4

United States v. *Curry*, 512 F.2d 1299, cert. denied, 423 U.S. 832 4

United States v. *Greenleaf*, 692 F.2d 182, cert. denied, 460 U.S. 1069 4

United States v. *Heffington*, 682 F.2d 1075 4

United States v. *Slocum*, 695 F.2d 650, cert. denied, 460 U.S. 1015 4

United States v. *Vadino*, 680 F.2d 1329, cert. denied, 460 U.S. 1082 3

Constitution and statutes:

U.S. Const. Amend. VI 2

18 U.S.C. 2 1

18 U.S.C. 371 1

18 U.S.C. 1952 1

21 U.S.C. 841(a)(1) 1

21 U.S.C. 848 2

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-407

DELBERT PAUL HOSKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the denial of a severance motion violated his right to confrontation because at the start of his jury trial a co-defendant did not contest involvement in some of the crimes charged.

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of conspiracy, in violation of 18 U.S.C. 371, two counts of interstate travel in aid of racketeering enterprises, in violation of 18 U.S.C. 1952 and 2, and one count of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to consecutive terms of imprisonment aggregating 30 years, a special parole term of five years, and cumulative fines totalling $70,000. The court of appeals affirmed (Pet. App. A1-A15).[1]

[1]The court of appeals also affirmed the convictions of co-defendants John Russell Webster, Jr., Robert Bode, and John Jay Caperton. The co-defendants have not sought further review.

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner and his co-defendants were engaged in a conspiracy to distribute cocaine in the Dallas, Texas area. The cocaine originated from various sources in Florida. Petitioner, a Florida source, sold large quantities of cocaine to co-defendant Webster, who in turn supplied cocaine to co-defendant Caperton, his friend and fellow dealer. See Pet. App. A2-A4.

2. Petitioner contends (Pet. 7-14) that the district court's denial of his severance motion violated his Sixth Amendment right to confront a witness against him. The "witness," co-defendant Webster, stated in the presence of the jury at a "re-arraignment" [2] that he was pleading not guilty but that he did not contest some of the overt acts listed in the conspiracy count and the facts set out in 16 of the 20 substantive counts with which he was charged.[3] Webster's counsel echoed these remarks in his opening statement. The district court denied petitioner's motion for a severance on the basis of its earlier instruction to the jury to give each defendant separate consideration (Tr. 590-591). A similar instruction was repeated at the close of the trial (Tr. 4912, 4914-4915, 4916, 4918). Webster did not implicate any other defendant in his initial plea responses, nor did his attorney suggest by his opening statement, cross-examination of trial witnesses, or closing argument that any other defendants were guilty. Pet. App. A9.

---

[2]The district court engaged in a peculiar procedure whereby, in the jury's presence, defendants entered pleas to each count in the indictment. See Pet. App. A7, A8. The court of appeals admonished against continued use of this practice (*id.* at A7 n.4), and it is not likely to recur.

[3]As explained by his attorney, Webster's trial strategy was to acknowledge the likelihood that he would be convicted on numerous substantive counts and to contest primarily the continuing criminal enterprise count (21 U.S.C. 848). See Pet. App. A8. The jury ultimately was unable to reach a verdict on that count.

The court of appeals correctly rejected petitioner's claim that he was deprived of his right to confront his "accuser," *i.e.*, co-defendant Webster (Pet. App. A9-A10 & n.6). The short answer is that Webster made no accusation against petitioner. Webster did not name or implicate petitioner, nor did he allude to him in any way. Of the counts to which Webster addressed his comments, three were also charged against petitioner (Counts 1, 16 and 17). Webster denied "many of the [overt] acts" charged in count one, the conspiracy count (Pet. 8); this certainly did not suggest that petitioner had conspired with him. Counts 16 and 17, respectively, charged petitioner with aiding and abetting Webster in a Travel Act and a cocaine possession offense. Webster did not "deny the acts" charged in Count 16, but stated that "many of the facts are incorrect" (Pet. 9). With respect to count 17, he said simply, "I don't deny the act" (Pet. 9-10). Again, nothing in Webster's statements suggested that petitioner aided and abetted any criminal act. Thus, the court of appeals correctly concluded (Pet. App. A9 (footnote omitted)) that "[t]he fact that Webster may have admitted his involvement in some of the charged conspiracy and substantive counts would not require necessarily the jury to conclude that the other codefendants, who disputed their involvement in the charged counts, were likewise involved. Moreover, it is noted that Webster never directly implicated his codefendants by name in any criminal activity in the process of pleading to the indictment." See also *United States* v. *Vadino*, 680 F.2d 1329, 1336 (11th Cir. 1982), cert. denied, 460 U.S. 1082 (1983).

The court of appeals also correctly rejected (Pet. App. A9 n.6) petitioner's reliance on *Bruton* v. *United States*, 391 U.S. 123 (1968). In *Bruton*, a nontestifying defendant's confession that implicated a co-defendant was introduced at their joint trial. This Court held that the confession incriminated the nonconfessing co-defendant, who was thereby

deprived of his right to confront and cross-examine his accuser. *Bruton*, however, involved "powerfully incriminating extrajudicial statements" that were "deliberately spread before the jury in a joint trial" with "devastating" impact on the nonconfessing defendant (391 U.S. at 135-136). In applying the *Bruton* rule, the courts of appeals have found that a violation occurs "only when the statement is both ' "clearly inculpatory" ' of the defendant and ' "vitally important" ' to the prosecution's case." *United States* v. *Slocum*, 695 F.2d 650, 655 (2d Cir. 1982), cert. denied, 460 U.S. 1015 (1983). See *United States* v. *Heffington*, 682 F.2d 1075, 1082-1083 (5th Cir. 1982); *United States* v. *Greenleaf*, 692 F.2d 182, 189 (1st Cir. 1982), cert. denied, 460 U.S. 1069 (1983). Here, Webster's statements were no more incriminating than a co-defendant's mid-trial guilty plea. See, *e.g.*, *United States* v. *Curry*, 512 F.2d 1299, 1303 (4th Cir.), cert. denied, 423 U.S. 832 (1975). Indeed, because Webster's comments accompanied his pleas of *not* guilty, there is little possibility that petitioner was inculpated in any way. And, because the statements were not evidence, were not anticipated by the government, and were not relied upon or argued to support an inference of petitioner's guilt, they were certainly not "vitally important" to the prosecution's case. In short, the court of appeals correctly applied established legal principles to the particular facts of this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1984

DOJ-1984-11